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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

COPY-PASTE PRECEDENT

Brian Soucek*

I. INTRODUCTION

Precedential opinions are written to be cited, quoted, and followed. This essay identifies another kind of “precedent”: unpublished opinions that are followed without being either cited or quoted. These decisions shape the course of the law not because they are binding—they explicitly are not—but simply because portions of their text get repeatedly copied and pasted into other unpublished opinions. “Copy-paste precedent” ends up having the influence of precedent without real precedent’s authority—or scrutiny.

If a decision’s influence is measured by the number of times it appears in case law, copy-paste precedent can sometimes have even more influence than a circuit’s

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precedential opinions on the same subject. To show this, I focus here on an example from a burgeoning area of unpublished case law—immigration—in the Second Circuit, a court that last year decided a full ninety-seven percent of its immigration cases through unpublished summary orders.¹ My example concerns an issue that has lately attracted Congressional attention and led to a deepening circuit split: the visibility required of social groups under asylum law.² The example is notable not least because it is wrong.

On one level, this is to say that the copy-paste precedent discussed below is substantively mistaken. The text that keeps getting copied and pasted into ever more unpublished summary orders diverges in a significant way from the Second Circuit's official doctrine. This point is not unimportant, given the fact that another asylum application is affected each time the mistaken text gets copied and pasted.

Worse, correcting a mistake like this in copy-paste precedent is at once less and more difficult than correcting one that is published. Unpublished opinions are less difficult to correct because they are not binding; yet they are also less likely to be corrected, because no one thinks to do so. The errors of unpublished opinions, even when they are discovered, are not thought to self-replicate as precedential ones do. Why then correct something which, it is assumed, will not guide future opinions?

In a world of copy-paste precedent, this last assumption fails to hold. Unpublished opinions do guide the opinions that follow, but troublingly, not as deliberately, and not nearly as openly, as precedential opinions do. This is the more significant, procedural sense in which the copy-paste precedent discussed in this essay is mistaken: It makes law the wrong way.

1. In 2012, the Second Circuit decided 582 appeals from decisions of the Board of Immigration Appeals, the administrative body within the Department of Justice responsible for adjudicating immigration claims. The Second Circuit published opinions in fifteen of those cases. Search in WestLaw CTA2 library, using the search “‘board of immigration appeals’ & da(2012),” further narrowed by “% ‘not selected for publication’” (Feb. 25, 2013) (yielding 585 hits before narrowing, three of which are cases that mention the BIA but are not themselves BIA appeals, and fifteen hits after narrowing; results on file with author).

2. See Refugee Protection Act of 2011, Sen. 1202, 112th Cong. § 5(a) (June 15, 2011) (revising the meaning of “particular social group” within the definition of “refugee”); see also nn. 35–36, *infra*, and accompanying text (describing the circuit split).

The point of this essay is thus to correct a mistake in the Second Circuit's case law, but it is not merely that. The broader aim is to call attention to an unacknowledged and mistaken way in which law gets made—not just in the Second Circuit, but, potentially, throughout the eighty-five percent of cases that the federal courts of appeals now decide through unpublished opinions.³

II. UNPUBLISHED OPINIONS

Unpublished opinions, as judges and lawyers well know, are nothing of the kind. Not only are they published in the Federal Appendix, but they are fully searchable on commercial databases and available—as required by law⁴—on appellate courts' websites. Since the controversial Rule 32.1 of the Federal Rules of Appellate Procedure went into effect in December 2006, courts may no longer prevent litigants from citing unpublished opinions issued in 2007 and later.⁵ Thus, the only real difference between published and unpublished opinions is that unpublished opinions do not have precedential effect. A federal appellate court's unpublished opinions do not bind either that circuit's trial courts or its future appellate panels.

Unpublished opinions are a relatively recent feature of the federal courts. It wasn't until 1973 that the Advisory Council on Appellate Justice recommended that the circuits establish publication plans to limit the number of published opinions and

3. Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts 2011*, at Table S-3, <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx> (click on “Judicial Business 2011” on main page, then click “Supplemental Tables,” then click “Table S-3”) (accessed Jan. 15, 2013; copy on file with Journal of Appellate Practice and Process) [hereinafter *Judicial Business 2011*].

4. See 44 U.S.C. § 3501 n. § 205(a)(5) (2004) (“Federal Courts”) (requiring court websites to provide “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format”) (available at <http://uscode.house.gov>).

5. Fed. R. App. P. 32.1(a)(ii) (Westlaw 2012); see Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23, 23–24 (2005) (noting that during the rulemaking process, Proposed Rule 32.1 received the second-highest number of comments of any rule ever proposed).

to restrict parties' ability to cite to those not published.⁶ Each circuit had done so by 1974.⁷

The current rule in the Second Circuit dictates that "[w]hen a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order."⁸ In the year ending September 30, 2011, the Second Circuit resolved 88.7 percent of its cases through such unpublished summary orders.⁹ The percentage is even higher for immigration cases, most of which are routed to the court's Non-Argument Calendar. There, in lieu of oral argument, judges receive summary orders drafted by staff attorneys and decide whether to sign the proposed orders or to send the cases to the regular calendar for argument.¹⁰ Whether argued or not, ninety-seven percent of the court's immigration cases were decided by summary order in 2012.¹¹

The wisdom and even the constitutionality of this arrangement have been heavily contested.¹² Supporters of unpublished opinions cite the growing caseload of the courts of appeals, the inability of judges to give precedent-worthy consideration to so many cases, the need to keep the law coherent and control the proliferation of case law, and the fact that many cases require judges simply to apply the law rather than make new law. Opponents claim that the rule of law and the "judicial power" granted under the Constitution both require

6. See David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Process 61, 63–64 (2009).

7. *Id.*

8. 2d Cir. I.O.P. 32.1.1(a) (2009).

9. See *Judicial Business 2011*, *supra* n. 3, at Table S-3.

10. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315, 349–50 (2011).

11. See *supra* n. 1.

12. For extensive listings of articles debating the wisdom and constitutionality of unpublished opinions, see Cleveland, *supra* n. 6, at 62 n. 5, 107 n. 273, 129–30 nn. 354–55; Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 Neb. L. Rev. 895, 896–97 nn. 2–11 (2008); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 705 n. 5 (2006). The constitutionality of non-precedential decisionmaking was debated within the federal courts in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000) (R.S. Arnold, J.), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000), and *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.).

that opinions have binding effect; they doubt whether judges can accurately determine which of their opinions are important enough to publish; they worry that non-publication is an attempt to shield opinions from review; and they fear for those litigants whose cases are, by judges' own admission, given less care and attention than those whose cases are decided through published opinions.

My goal here is not to repeat or add to the extensive debate about the value of unpublished, non-precedential decisions. Instead, it is to show how decisions that are formally non-precedential can, in practice, end up playing the role of precedent. To do so, I turn to the Federal Appendix—the repository of the federal appellate courts' unpublished case law—in order to look at a series of recent Second Circuit decisions on the subject of asylum, social groups, and visibility.

III. SOCIAL GROUPS AND VISIBILITY IN ASYLUM LAW

To obtain asylum in the United States, an applicant generally must show a well-founded fear of being persecuted for one of five reasons: race, religion, nationality, political opinion, or “membership in a particular social group.”¹³ The last of these is the least well understood; in the words of the Department of Justice—the agency charged with interpreting the phrase—it is “universally recognized to be ambiguous.”¹⁴

In a 1985 opinion, the Board of Immigration Appeals (BIA) construed “particular social group” to require some “common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹⁵ The Second Circuit added to this definition in 1991, requiring that group members share a “characteristic in

13. 8 U.S.C. § 1158(a)(2)(A) (available at <http://uscode.house.gov>).

14. Br. of Respt., *Gaitan v. Holder*, http://www.ilcm.org/documents/litigationseg/CA8_10-1724_Gaitan_v_Holder_br_f_OIL.pdf at 22 (No. 10-1724, 671 F.3d 678 (8th Cir. 2012)) (accessed Jan. 16, 2013; copy on file with Journal of Appellate Practice and Process).

15. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *abrogated on other grounds*, *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”¹⁶

Quoting the Second Circuit’s decision, the BIA specified in 2006 that social-group claims require a showing of something it called “social visibility”¹⁷—that is, “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”¹⁸ The Second Circuit deferred to the BIA’s interpretation of “particular social group” twice in 2007, in two precedential decisions that show no awareness of one another.¹⁹

Running through these opinions is a crucial ambiguity between two interpretations of “social visibility.” On the one hand, the opinions look to whether a given group is “perceived as a group by society.”²⁰ This cognitive approach considers how a society thinks of itself as being carved up into various groups and guards against the invention of ad hoc groups proposed solely for the purpose of asylum applications.²¹ The second approach takes visibility literally, requiring that the characteristic uniting the group be “highly visible and

16. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The Second Circuit has since clarified, if not repudiated, a second holding in *Gomez* that had seemed to preclude the recognition of groups defined by “broadly-based characteristics such as youth and gender.” *Id.*; see also *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007) (pointing out that the Circuit had “recently clarified that the best reading of *Gomez* is one that is consistent with *Acosta*” and that “*Gomez* should be read as standing for the proposition that an individual will not qualify for asylum if he or she fails to show a risk of future persecution on the basis of the membership claimed in the particular social group”). Authors of the Second Circuit’s unpublished summary orders have occasionally failed to note this clarification. See e.g. *Kauzonait v. Holder*, 351 Fed. Appx. 529, 531 (2d Cir. 2009) (citing *Gomez*); *Xiao Fen Lian v. Holder*, 313 Fed. Appx. 393, 395 (2d Cir. 2009) (same).

17. *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

18. *Id.*; see also *id.* at 959–61 (discussing “social visibility” of groups composed of former drug informants).

19. Compare *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (decided Nov. 21, 2007) (discussing “social visibility” and the use of “well-defined boundaries” when determining membership in the group at issue) with *Koudriachova*, 490 F.3d at 261–62 (decided June 26, 2007) (discussing groups “united by some shared past experience,” and noting that “the BIA has adopted a broad definition of particular social group,” so “courts must examine closely whether the persecution the applicant fears derives primarily from his or her status as a member of that particular social group”).

20. *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (quoting definition of “particular social group” used by United Nations High Commissioner for Refugees); see also *C-A-*, 23 I. & N. Dec. at 956 (same).

21. See Brian Soucek, Student Author, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 Yale L. & Policy Rev. 337, 342 (2010).

recognizable by others in the country in question.”²² The difference between the two approaches comes down to society’s “seeing” (in a metaphorical sense) those who share a characteristic as being part of some group, versus seeing (in the literal sense, with one’s eyes) some characteristic shared by members of the group.

When the Second Circuit published its two opinions deferring to the BIA’s interpretation of “particular social group,” it clearly had the cognized-group approach in mind. *Koudriachova*, the first of these opinions, defined visibility as “the extent to which members of society perceive those with the relevant characteristic *as members of a social group*.”²³ Likewise, *Ucelo-Gomez*, the second opinion, stressed that “persecutory action toward a group may be a relevant factor in determining [its] visibility.”²⁴ Presumably the court did not mean that persecutory action produces literally visible characteristics (though, sadly, that sometimes happens); the court surely meant that persecution of a group provides good evidence that people *think* of it as a group.

Since these two opinions, the Second Circuit has mentioned social groups and visibility in only four more published opinions,²⁵ just two of which give the concept more than passing notice. The language that *Koudriachova* took almost verbatim from the BIA has only been quoted once in any Second Circuit opinion. Not one of the Second Circuit’s thirty unpublished summary orders that discuss social visibility quotes the definition given in the court’s first precedential statement on the subject.

22. *C-A-*, 23 I. & N. Dec. at 960; *see also A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74 (noting that “the shared characteristic of the group should generally be recognizable by others in the community”).

23. *Koudriachova*, 490 F.3d at 261 (emphasis added).

24. *Ucelo-Gomez*, 509 F.3d at 73 (referring to discussion in *C-A-*).

25. *See Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010); *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008); *Savchuck v. Mukasey*, 518 F.3d 119, 123 (2d Cir. 2008); *see also Gashi v. Holder*, 702 F.3d 130, 136 (2d Cir. 2012) (discussed in n. 63, *infra*).

IV. THE SECOND CIRCUIT'S UNPUBLISHED SOCIAL-GROUP "PRECEDENT"

Instead of quoting *Koudriachova*'s precedential statement on the meaning of social visibility, the first of the Second Circuit's thirty summary orders on the subject, *Romero v. Mukasey*,²⁶ explained the newly adopted requirements for social groups in its own words: "[I]n order to constitute a particular social group, a proposed group must (1) exhibit a shared characteristic that is socially visible to others in the community, and (2) be defined with sufficient particularity."²⁷

Romero's gloss on the first of the two requirements diverged from the language of the BIA's and Second Circuit's precedential opinions in ways that are subtle, but significant.²⁸ The BIA opinion cited in *Romero* provided that the shared characteristic "should generally be recognizable by others in the community."²⁹ *Romero* replaced the more ambiguous "recognizable" with "visible." Moreover, *Romero* required that this visible characteristic be "exhibit[ed]"—a word not found in either the BIA's or the Second Circuit's opinions. Finally, where Second Circuit precedent had talked of the social group's visibility,³⁰ the *Romero* test required the group's shared characteristic to be socially visible. All three of these changes tipped the definition significantly toward the literalist reading of visibility.

This turn toward literalism made no difference in *Romero* itself, because *Romero* won in the Court of Appeals.³¹ But this is

26. 262 Fed. Appx. 328 (2d Cir. 2008).

27. *Id.* at 330 (citing *A-M-E-*, 23 I. & N. Dec. at 74–76).

28. The BIA held "that the shared characteristic of the group should generally be recognizable by others in the community." *A-M-E-*, 23 I. & N. Dec. at 74. The Second Circuit held that membership in a purported social group requires a certain level of "social visibility" and the definition of the social group must have particular and "well-defined boundaries." *Ucelo-Gomez*, 509 F.3d at 73.

29. *A-M-E-*, 23 I. & N. Dec. at 74.

30. *See Ucelo-Gomez*, 509 F.3d at 73 ("[P]ersecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.").

31. *Romero*, 262 Fed. Appx. at 333 (deeming the proposed social group—wealthy Colombian land and business owners—dissimilar enough from "wealthy Guatemalans," a group that the BIA and Second Circuit had previously refused to recognize, and remanding to the BIA for further consideration).

where the copying and pasting began. The *Romero* gloss³² appears verbatim in eleven separate unpublished Second Circuit summary orders entered from January 2008 to April 2012—nearly a third of the cases in which the Second Circuit has ever defined visibility in the context of social groups. If a precedent’s importance is measured by the number of times it gets repeated, *Romero* is easily the most important “precedent” on this subject in the Second Circuit. Yet *Romero*, as an unpublished summary order, has never been cited by the Second Circuit.

Unfortunately, the *Romero* gloss is not the only instance of copying and pasting within this set of opinions. An additional formulation of the visibility requirement first appeared in *Xiao Fen Lian* in March 2009³³ and then reappeared in four subsequent summary orders, most recently in May 2012. It held that “membership in the group must entail a level of ‘social visibility’ sufficient to identify members to others in the community, particularly to potential persecutors.”³⁴ Note the crucial language here: Social visibility requires that there be something “sufficient to identify members” of the group to the public. Once again, the language suggests a literalist reading of

32. See n. 26, *supra*, and accompanying text.

33. See 313 Fed. Appx. at 395. *Xiao Fen Lian* also relies upon a quotation from *Gomez*—precluding the use of a definition of social groups rooted in “broadly-based characteristics such as youth and gender”—that ceased to be good law in the Second Circuit in 2006. See *Gao v. Gonzales*, 440 F.3d 62, 69–70 (2d Cir. 2006) (discussing *Gomez* and *Acosta*, but declining to “decide the exact scope of *Gomez* . . . because Gao belongs to a particular social group that shares more than a common gender”), *vacated and remanded, sub nom Keisler v. Gao*, 552 U.S. 801 (2007); see also *Koudriachova*, 490 F.3d at 262.

34. *Xiao Fen Lian*, 313 Fed. Appx. at 395; see also *Paucar-Sarmiento v. Holder*, 482 Fed. Appx. 656, 658 (2d Cir. 2012) (“A ‘particular social group’ must: (1) ‘share a common, immutable characteristic’ that has a level of ‘social visibility’ sufficient to identify members to others in the community, particularly to potential persecutors; and (2) be defined with sufficient particularity.”); *Oliva-Flores v. Holder*, 477 Fed. Appx. 774, 775 (2d Cir. 2012) (noting first that “[a] cognizable social group must: (1) exhibit a shared characteristic that is socially visible to others in the community; and (2) be defined with sufficient particularity,” and then also that “[t]he ‘social visibility’ test requires that the shared traits that characterize the social group be sufficient to identify members of that group to others in the community, particularly to potential persecutors”); *Riano v. Holder*, 358 Fed. Appx. 251, 253 (2d Cir. 2009) (asserting that group characteristic “must also entail a level of ‘social visibility’ sufficient to identify members to others in the community, particularly to potential persecutors . . . and must also ‘be defined with sufficient particularity’” (citations omitted)); *Kauzonaite*, 351 Fed. Appx. at 531. *Oliva-Flores* is especially notable because it copies and pastes both the *Romero* gloss and the language from *Xiao Fen Lian* into a single paragraph.

visibility—equating it with something that can be seen. Like the often-copied *Romero* gloss, then, this too requires social-group members to exhibit a trait that even passing strangers could discern.³⁵

As three circuits have now held, this reading of social visibility “makes no sense.”³⁶ Moreover, the Solicitor General told the Supreme Court in 2010 that this literalist interpretation is wrong, pointing out that the BIA’s precedential decisions

have equated “social visibility” with the extent to which the relevant society perceives there to be a group in the first place, rather than the ease with which one may necessarily be able to identify particular individuals as members of such a group.³⁷

35. *Cf. Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (rejecting the notion that “you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic,” and noting as well that “[v]isibility” in the literal sense in which the Board has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution it will be on the ground of group membership”).

36. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (noting in addition that “[i]f you are a member of a group that has been targeted . . . you will take pains to avoid being socially visible” in the literal sense); *see also Henriquez-Rivas v. Holder*, 2013 WL 518048 at **5–6 (9th Cir. Feb. 13, 2013) (en banc) (“[A] requirement of ‘on-sight’ visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute.”); *Valdiviezo-Galdamez v. Atty. Gen.*, 663 F.3d 582, 605–07 (3d Cir. 2011); *cf. Soucek, supra* n. 21, at 341–42 (equating literal visibility with a requirement that social groups smell a certain way, and noting that literal visibility is not required of the other four grounds for asylum). One intriguing suggestion for a way in which courts’ emphasis on literal visibility might make sense can be drawn from Andrew B. Coan’s essay *Judicial Capacity and the Substance of Constitutional Law*, 122 Yale L.J. 422 (2012). Coan argues that courts are more likely to adopt hard-edged rules in high-volume domains. Because the literal visibility of a trait is more easily determined than the social salience of a group in a foreign society, this analysis suggests that courts’ literalist reading of social visibility might simply be a response to the volume of immigration cases that courts face.

37. *Br. of Respt., Contreras-Martinez v. Holder*, 2010 WL 1513110 at 13 (No. 09-830, 130 S. Ct. 3274 (2010)) (describing as “incorrect” the “premise that the BIA views its ‘social visibility’ criterion as requiring that members of a particular social group must literally be visible to the naked eye” but acknowledging that statements made by lawyers elsewhere in the Department of Justice have not always borne out the Solicitor General’s assurance, however, and so “the government’s briefs and oral argument . . . may have contributed to the confusion”).

Lawyers from the Department of Justice have drawn this corrective distinction ever since, most recently before an en banc panel of the Ninth Circuit.³⁸

The most frequently repeated definition of social visibility in the Second Circuit's case law is therefore one that diverges subtly but significantly from the Second Circuit's reported precedent. And notably, it diverges towards a position that the Department of Justice—the agency charged with interpreting and applying the Immigration and Nationality Act—has officially disclaimed.

Nor is the Second Circuit's mistake an innocuous one. For example, in one of *Romero's* progeny, *Xiang Ming Jiang v. Mukasey*,³⁹ the proposed social group—"people who are targeted for gang violence because they are caught between rival criminal gangs but are not protected by police in China"—was rejected in part because "nothing in the record reflect[ed] that [the applicant] possesse[d] any characteristics that would allow others in Chinese society to recognize him as someone caught between rival gangs."⁴⁰ By requiring that the person—rather than the group—be recognizable, the Second Circuit clearly applied the visibility requirement literally: To be a member, one has to look a certain way.

Were this the kind of recognizability that is required, past social groups recognized by the BIA—groups such as Cuban homosexuals, women opposed to female genital mutilation, and former Salvadoran police officers⁴¹—would no longer pass

38. Supp. Br. of Respt. on Rehearing En Banc, *Henriquez-Rivas v. Holder*, at 17–23 (No. 09-71571, 449 Fed. Appx. 626 (9th Cir. 2012)). Even more recently, the Department of Homeland Security has filed a brief with the Board of Immigration Appeals urging it to combine "social visibility" and "particularity" into a "social distinction" test. See Br. on Remand of Dept. of Homeland Sec., *In re Valdiviezo-Galdamez*, at 7–8 (File No. A097 447286 (B.I.A. May 29, 2012)) (discussing current BIA standard and need for additional clarification, arguing that "the focus should be on whether the society meaningfully distinguishes persons with the shared characteristic from persons who do not possess the trait," and concluding that "the individual alien applicant may, but does not necessarily have to, be literally visually identifiable as a group member (or be otherwise identifiable by means of other physical senses, such as by accent)").

39. 296 Fed. Appx. 166 (2d Cir. 2008).

40. *Xiang Ming Jiang v. Mukasey*, 296 Fed. Appx. 166, 168 (2d Cir. 2008). Just two sentences earlier, however, the court invoked the other, non-literal interpretation of social visibility: "Jiang must also show that the group he describes is generally perceived as a discrete group by Chinese society." *Id.*

41. See *C-A-*, 23 I. & N. Dec. at 955.

muster.⁴² The immigration judge who ruled that an applicant was not part of a socially visible group because “it is unlikely that anyone would be able to tell from looking at him that he is HIV positive” provides a cautionary lesson.⁴³ None of the Second Circuit’s cases has yet rejected an asylum claim solely because the applicant did not look a certain way. But because BIA decisions are themselves nearly always unpublished, it is impossible to know how the BIA applies the Second Circuit’s formulation of the test once a case is remanded for further proceedings consistent with the court’s unpublished opinion.⁴⁴

Viewed together, the Second Circuit’s social-group cases show that the Circuit’s two most important “precedents” in this area are not its two initial published opinions on the topic, but two unpublished, and thus largely unknown, decisions. Neither has ever been explicitly quoted or cited, but those two summary orders’ gloss on the meaning of visibility has been copied and pasted into sixteen of the Circuit’s thirty-six opinions on the subject. None of the court’s other opinions on the topic has proven even nearly so influential.

V. COPY-PASTE PRECEDENT

It is easy to imagine how copy-paste precedent arises. Unpublished opinions are an efficiency mechanism—a way of dispensing more quickly with cases that supposedly break no

42. See generally Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Policy Rev. 47 (2008).

43. See *Rodriguez v. Atty. Gen.*, 381 Fed. Appx. 217, 219 (3d Cir. 2010) (affirming on other grounds, but neither disturbing nor even commenting on the immigration judge’s interpretation of the social-visibility requirement).

44. It is also impossible to know the extent to which immigration judges and asylum officers rely on their circuits’ unpublished case law in reaching their decisions. A further worry stems from appellate courts’ tendency to reach back to their unpublished case law when writing published opinions. For two particularly relevant examples concerning social groups, see *Orellana-Monson v. Holder*, 685 F.3d 511, 519 (5th Cir. 2012) (“Whether or not the BIA’s ‘particularity’ and ‘social visibility’ requirements for defining membership in a ‘particular social group’ are valid, is an issue of first impression in this circuit. However, we do not come to this issue with a blank slate, as numerous unpublished decisions in this circuit have previously relied on the BIA’s interpretation.”), and *Gashi*, 702 F.3d 130 (discussed in n. 63, *infra*).

new legal ground.⁴⁵ In this context, copying and pasting makes sense. Creativity is understandably frowned upon when an opinion's only goal is to apply established law to the facts of a case and communicate the result to the parties involved.⁴⁶

This efficiency rationale is especially predominant in the immigration context, where the case surge⁴⁷ of the last decade prompted the Second Circuit to institute a Non-Argument Calendar and hire additional staff attorneys to draft summary orders for its judges to review and sign.⁴⁸ Given the Circuit's push to deal more briskly with its immigration caseload, recycling text from previous opinions is practically unavoidable. Even so, the text copied into unpublished opinions is presumably meant to come from precedential opinions, not other unpublished opinions.⁴⁹

45. Until their most recent revision, the Second Circuit's Local Rules prefaced the Circuit's policy about summary orders with the observation that "[t]he demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively." See 2d Cir. Loc. R. 32.1(a) (2009) (superseded).

46. *Hart*, 266 F.3d at 1178 ("An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.").

47. See John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. Sch. L. Rev. 13, 14 n. 2 (2006) ("[T]he Second Circuit received 2360 petitions for review [of BIA decisions] between April 1, 1972 and April 1, 2002; it received 7723 petitions for review between April 1, 2002 and October 1, 2005.") Streamlining procedures enacted at the BIA in 2002 both increased the number of cases decided by that agency each year and led to an increase in the percentage of those cases appealed to the federal courts of appeals. See *id.* at 20; see also Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 Nw. J. L. & Soc. Policy 1, 11 (2012) (noting that the Second Circuit received 184 immigration appeals in 2001, 2632 in 2004, and 2865 in 2008).

48. See generally Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 Brooklyn L. Rev. 429 (2009). For a detailed and scathing discussion of the areas of law in which appellate courts are most prone to rely on staff attorneys, see Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1 (2007).

49. The point of precedential opinions, after all, is that they are written to be followed in similar cases. One of the greatest values of a system of precedent—a system that, it should be said, is a relatively recent innovation in the long history of the common law, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 659–62 (1999) (discussing early history of precedent-based legal system)—is its contribution to efficient adjudication. See e.g. Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification*, 72–73 (Stanford U. Press 1961); Benjamin N. Cardozo, *The Nature of the Judicial Process*, 149 (Yale U. Press 1921) ("[T]he labor of judges would be increased almost to the breaking

Copy-paste precedent originates in unpublished opinions and perpetuates itself through other unpublished opinions. Thus, it differs from ordinary precedent in two troubling ways: It arises unintentionally and it operates surreptitiously. Those writing unpublished opinions have no way of knowing in advance that their text might get reused, eventually acquiring the influence of regular precedent. And when it does—when later unpublished opinions copy language from an earlier unpublished opinion—the later opinions do not, because they cannot, acknowledge their source.

Copying text that was not written with the intention that it be copied presents an obvious danger: The copied text may not have been crafted with the same care afforded to opinions intended as precedential.⁵⁰ But the clandestine aspect of copy-paste precedent gives rise to even deeper problems. For one, it exacerbates the charge, made against unpublished opinions in general, that they fly under the radar, attempting to avoid review. When it comes to copy-paste precedent, not only do individual opinions fly under the radar, but their cumulative effect—the expanding influence some opinions attain through copying and pasting—remains almost completely obscured. Without citations linking each unpublished opinion back to the unpublished source of the language it contains, identifying copy-paste precedent is no easy task. Discovering examples would require either database searches capable of identifying repeated non-quoted text or else a detailed familiarity with precisely that set of cases that otherwise gets the least attention in scholarly literature: unpublished summary orders. This likely explains

point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 599 (1987); but see Earl Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367, 370 (1988) ("In essence, the argument for efficiency is based on the proposition that it is better to decide cases quickly than correctly.").

50. *Hart*, 266 F.3d at 1177 ("Writing a precedential opinion . . . is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task. . . . It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them."). For a discussion of what the rule of law requires of judges writing a precedential opinion (as opposed to judges following one), see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich. L. Rev. 1, 14 (2012) (suggesting a requirement that judges issue opinions, state reasons, and try to articulate the bases of their holdings as general norms).

most scholars' apparent failure even to notice copy-paste precedent, and it poses an obstacle for further study as well.

Yet the problems stemming from the opacity of copy-paste precedent are not only, or even primarily, external. The lack of transparency affects the internal workings of courts as well. Because the links that bind copy-paste precedent to the opinions that follow it are unseen, courts have less incentive and diminished ability to correct mistakes perpetuated by copy-paste precedent even when they are discovered. Consider *Romero*: Were judges on the Second Circuit to receive a staff attorney's draft order containing the *Romero* text, they would be unlikely to notice its subtle error, in part because of the lessened attention given to unpublished opinions.⁵¹

But even if a particularly discerning judge took issue with the text and revised it, this would do nothing to solve the larger problem. The summary order in that case would be improved, but *Romero* would remain as copy-pasteable as ever. Because the draft opinion copied and pasted *Romero* without citing it, the judge correcting the draft opinion would not feel any need to discuss or distinguish *Romero*, thereby limiting or correcting its holding. In effect, the court would have refused to follow a precedent without realizing it was doing so—and thus, without overruling the prior decision. For this reason, paradoxically, copy-paste precedent is, as a practical matter, harder to overrule than real precedent.

On a more theoretical level, copy-paste precedent, by operating covertly, sacrifices most of the values that make genuine precedent worthwhile. Adhering to precedent is said to give stability to the law and to allow those governed by the law to rely on its provisions.⁵² Precedent serves to provide notice of what the law is. “[I]t fosters the *appearance* of certainty and

51. Allowing judges to give some cases less attention than others is, recall, among the primary reasons for having unpublished opinions in the first place. See nn. 46–47, *supra*, and accompanying text.

52. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); see also Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 13–14 (1989) (discussing reliance value); Hillel Y. Levin, *A Reliance Approach to Precedent*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087803 (June 19, 2012) (accessed Jan. 21, 2013; copy on file with Journal of Appellate Practice and Process).

impartiality by providing a seemingly neutral source of authority to which judges can appeal in order to justify their decisions.”⁵³ It also helps to ensure that like cases will be treated alike.⁵⁴ Copy-paste precedent does none of these things. Because no one realizes when copying and pasting is happening, the stability that copy-paste precedent provides to the law—the stability of repetition—does nothing to give notice, promote reliance, foster courts’ legitimacy, or assure fairness. It only serves the one remaining value of precedent: efficiency.

Given these many differences between genuine precedent and copy-paste precedent, perhaps the latter should not be called a type of precedent at all. In a literal sense, the term is misplaced. After all, the hallmark of a precedential holding is that, barring special circumstances,⁵⁵ it must be followed whether or not the judges who follow it would have come to the same decision themselves.⁵⁶ Precedent is thus a compelled repetition of a holding previously reached, and that compulsion springs from the values just canvassed: rule of law, reliance, fairness, legitimacy, and efficiency. Copy-paste precedent can be seen as a type of precedent (or something closely analogous) only insofar as its efficiency value is weighty enough to compel courts to follow it. The compulsion of copy-paste precedent is thus more akin to physical than to moral necessity: Even if courts are not institutionally bound to follow it, the pressures of handling what judges perceive as crushing caseloads⁵⁷ may

53. Maltz, *supra* n. 49, at 371 (italics in original); see also Lee, *supra* n. 49, at 652–53 (reviewing benefits of certainty); see also *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (“[S]tare decisis . . . permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

54. The “equality value” of precedent is critically discussed in Alexander, *supra* n. 52, at 12–14.

55. See *Casey*, 505 U.S. at 854–55.

56. See Alexander, *supra* n. 52, at 4.

57. See generally Bert I. Huang, *Lightened Scrutiny*, 124 Harv. L. Rev. 1109 (2011) (examining the impact of federal appellate courts’ “immense” workloads on case outcomes). Perceptions of what constitutes a crushing workload are context dependent, however; for example, judges in the state courts of general jurisdiction handle an average of 1,800 new cases each year. See Robert C. LaFountain, Richard Schaffler, Shauna M. Strickland, Sarah A. Gibson & Ashley N. Mason, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads*, <http://www.courtstatistics.org/Other-Pages/CSP2009.aspx> at 5 (Nat'l. Ctr. for St. Cts. 2011) (accessed January 29, 2013; copy on file with Journal of Appellate Practice and Process).

make them feel compelled to follow copy-paste precedent with a fidelity approaching that which they accord genuine precedent.

Following copy-paste precedent has the benefit of speeding up adjudication with few or no costs to the author, given the obscurity in which its use occurs. Even so, however, the efficiency gains of copy-paste precedent deserve a second look.⁵⁸ For a staff attorney assigned the task of writing yet another summary order on social groups, it is of course more efficient to copy and paste text from a case like *Romero* than to cobble together an original paragraph that sets forth the relevant legal standard. (This, it should be noted, is not unique to appellate courts or their staff attorneys. In the federal district courts,⁵⁹ it is quite common for a judge to borrow liberally from his or her own previous opinions; readers can easily find paragraphs stating, say, the standard for summary judgment, qualified immunity, or *McDonnell Douglas* burden-shifting repeated verbatim in a given judge's many opinions employing those standards. This is often done tacitly, and for good reason: Because district-court opinions do not have precedential value,⁶⁰ it makes no sense for district judges to quote and cite themselves. No principle becomes more correct just because the same judge says it twice.)

Having noted the obvious fact that it is quicker to copy-paste than to write afresh, it is important for me to observe another equally obvious point: that it is no less quick to copy and paste correct text than it is to copy text based on a mistaken understanding of the law. Efficiency may dictate that later cases copy and paste text from earlier cases, but it does not explain

58. For a critique of efficiency arguments made in favor of unpublished opinions in general, see Kenneth F. Hunt, Student Author, *Saving Time or Killing Time: How the Use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, 61 *Syracuse L. Rev.* 315, 330–35 (2011).

59. Professor Levin has critiqued the prevalence of what he calls “unpublication” in the federal district courts. According to Levin, only three percent of federal district-court orders in which some matter is decided are included on Westlaw or LEXIS. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 *Vill. L. Rev.* 973, 985 (2008).

60. See e.g. *Camreta v. Greene*, ___ U.S. ___, ___, 131 S. Ct. 2020, 2033 n. 7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting Lawrence B. Solum, *Stare Decisis in United States Courts*, in 18 *Moore’s Federal Practice* § 134.02[1][d] (3d ed. 2011))).

why those earlier cases are themselves wrong. Surely the author of *Romero* did not save much time by paraphrasing the legal standard for social-group visibility rather than quoting it directly from one of the Circuit's precedential opinions. That is to say, the efficiency gained by copying and pasting—the sole justification for copy-paste precedent—should not be compared with a system in which judges or clerks or staff attorneys have to begin each opinion from scratch. The more relevant comparison is how much the use of copy-paste precedent increases efficiency relative to the ordinary system of precedent, in which prior precedential decisions are explicitly quoted and cited.⁶¹

This points to one modest suggestion for reform: Courts should refrain from releasing unpublished opinions when the governing legal principle either is not, or cannot be, quoted directly from a precedential opinion. When courts cannot do that, there may be reason to believe that their unpublished opinions are actually making new law—whether intentionally or, as in cases like *Romero*, unintentionally. In cases like that, courts would do better to pause and produce real precedent, rather than take the chance that copy-paste precedent will continue to replicate.

Of course, relying exclusively on published opinions will not eliminate error. Errors occur in precedential decisions too, and these are sometimes repeated in subsequent cases without anyone's noticing the original mistake.⁶² So while I have pointed out a recurring substantive mistake in the line of immigration cases discussed here, the more worrisome mistake—the one common to all copy-paste precedent—is not substantive but procedural.

Copy-paste precedent, as I have said, lacks most of the justifications that support regular precedent. It does not promote

61. Copy-paste precedent does have one dubious efficiency advantage over ordinary precedent: Because parties do not generally know that copy-paste precedent exists—and are certainly not compelled to cite it—they do not have to devote time to researching these potentially relevant precedents, thereby avoiding one of the inefficiencies sometimes attributed to a system of *stare decisis*. See e.g. Waldron, *supra* n. 50, at 3 (describing the “immense” research efforts required of lawyers and judges in a precedent-based judicial system).

62. For an excellent example, see Adam D. Chandler, Student Author, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L.J. 2183, 2191 (2011) (describing the First Circuit's case law on Puerto Rico's Eleventh Amendment immunity as the product of a “judicial game of ‘telephone’”).

reliance, or legitimacy, or equality. Its contributions to efficiency are likely overestimated, at least in comparison to ordinary precedent. And as for giving notice of what the law requires, copy-paste precedent does not lack just that particular virtue, it actually subverts it. Copy-paste precedent is not openly acknowledged, so litigants are left in the dark as to the legal tests that will probably govern their cases, even while copy-paste precedent is, in fact, shaping the course of future law. When a court's most frequently used statement of law on a given topic is one that has no binding force, litigants have no idea that this is the test they are supposed to meet or argue against. Asylum applicants, never having heard of *Romero*, cannot know that the *Romero* test is the one the Second Circuit is most likely to use in determining whether their social group is visible enough for their applications to succeed.

VI. CONCLUSION

Romero and the decisions that have copied and pasted its text suggest that to qualify as a social group, asylees must share a trait that is visible to society at large. This is wrong. But the deeper wrong is that the Second Circuit's case law on this subject is guided by a system of "precedent" that is itself not visible. Copy-paste precedent has avoided visibility in both of the senses described above: Before now, it has not been recognized or understood, and even now, it operates in ways almost entirely unseen.⁶³

An asylum seeker with a well-founded fear of persecution may have good reason to stay out of the public eye. The precedent that guides courts' decisions does not.

63. Well after this essay was submitted for publication, a sixth precedential opinion discussing social-group visibility was issued by the Second Circuit. In *Gashi v. Holder*, 702 F.3d 130, 136 (2d Cir. 2012), the Second Circuit held that the common characteristic shared by a group's members "must have enough 'social visibility' that it identifies members of the group to others in the community, particularly to potential persecutors." This language is partly a paste and partly a close paraphrase of the relevant language from *Xiao Fen Lian*. See *supra* n. 34 and accompanying text. *Gashi* thus provides a fascinating instance of copy-paste precedent becoming real precedent. Although its description of identifying characteristics may suggest a literalist reading of visibility, this did not keep the *Gashi* court from finding that witnesses known to have cooperated with war crimes investigators in Kosovo comprise a cognizable social group.